No. 87-47

IN THE

Supreme Court of the United States

October Term, 1987

KEVIN M. COURTRIGHT,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. IS A VOLUNTARY STATEMENT REGARDING A CRIME, MADE TO A LAW ENFORCEMENT OFFICER, RENDERED INVOLUNTARY BY THE OFFICER STATING THAT IF THE INFORMANT WAS NOT A PARTICIPANT IN THE CRIME HE WOULD NOT BE CHARGED IN THAT OFFENSE?

II. MAY STATEMENTS OF AN INDIVIDUAL ABOUT A CRIME TO WHICH NO RIGHT TO COUNSEL HAS ATTACHED BE ADMITTED AGAINST THAT INDIVIDUAL IN THE TRIAL OF THAT CRIME NOTWITHSTANDING THE FACT THAT THE ACCUSED HAD COUNSEL ON UNRELATED CHARGES?

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OPINIONS BELOW

The opinions of the Franklin County Court of Common Pleas, the Court of Appeals for the Tenth Appellate District of Ohio and of the Ohio Supreme Court are adequately set forth in the petition.

JURISDICTION

Jurisdiction is claimed by the petitioner under 28 U.S.C. § 1257(3). However, the petition is not timely filed. The decision of the Ohio Supreme Court denying review was entered on March 18, 1987. The petition was not docketed until July 2, 1987.

CONSTITUTIONAL PROVISIONS

The Fifth and Sixth Amendments are adequately set forth in the petition.

STATEMENT OF THE CASE

On February 14, 1985, petitioner was charged by indictment with aggravated murder (by prior calculation and design and in the course of a kidnapping) in the slaying of Deborah Hardy. Prior to trial, petitioner moved to suppress his statements made to police officers while petitioner was acting as an informant in a narcotics investigation. Petitioner's motion generally alleged the statements were obtained in violation of his various rights under the Fifth, Sixth and Fourteenth Amendments. Petitioner's motion did not allege his statements were involuntary. Petitioner did not testify at the hearing held on his motion. The motion was denied and petitioner's statements were admitted at his criminal trial. Petitioner was convicted and sentenced to life imprisonment.

Petitioner appealed his conviction to the Ohio Court of Appeals for the Tenth Appellate District and to the Ohio Supreme Court. On direct appeal to the Ohio courts, petitioner did not claim that his statements were involuntary. Rather, petitioner restricted his argument to a claim that he was denied his Sixth Amendment right to counsel.[1]

Petitioner was originally arrested on October 24, 1984, in Columbus, Ohio, after he sold cocaine to undercover investigators. He was charged with violating federal narcotics laws. Counsel was appointed on the federal narcotics

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[1] Petitioner's claim regarding his statement was restricted to the Sixth Amendment right to counsel and was set forth by the state court of appeals as petitioner's second assignment of error in the appellate court's opinion. Appendix to petition, page A-4. Petitioner did not expand upon that issue in his brief in the Ohio Supreme Court.

charge. Petitioner and his counsel met with representatives of the Federal Bureau of Investigation, Columbus Police Department Narcotics Bureau and the Assistant United States Attorney. It was agreed that if petitioner cooperated fully in the narcotics investigation, he would be charged with one count of distributing marijuana. Petioner and his counsel further agreed that investigators would meet directly with petitioner and that petitioner's counsel need not be present.

After some weeks, authorities concluded petitioner was not cooperating as he had promised. On December 24, 1984, David Hite, petitioner's drug supplier and the subject of the continuing narcotics investigation, was murdered. Columbus homicide investigators asked to meet with petitioner to attempt to learn who might have murdered Hite. On December 28, 1984, investigators met with petitioner at a fast food restaurant. Homicide investigators were interested in Hite's associates and asked petitioner about various people. When Deborah Hardy's name was mentioned, petitioner reacted physically. Petitioner was once again advised of his *Miranda* rights. Petitioner assured investigators that he was not involved in Hardy's murder.[2] Petitioner was told that if he did not participate in Hardy's murder,

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[2] During the motion hearing, investigators testified that they were taken completely by surprise when petitioner stated he knew details of Hardy's murder. The officers told petitioner that if he did not kill Hardy or participate in her death or act with others in causing her death, but was merely a bystander, he would not be charged. Appendix to petition, pages A-11, A-12. The state trial court also found that petitioner acknowledged that this was true in his tape recorded interview with investigators. Appendix to petition, page A-12.

but was merely a bystander, he would not be charged with that crime. After again assuring investigators he was only a bystander, petitioner revealed details of Hardy's abduction and slaying. Investigators did not feel petitioner was a direct participant in the murder. After agreeing to take a polygraph test, petitioner left the restaurant. On January 7, 1985, petitioner appeared at the police station as he had agreed and submitted to the polygraph examination. During the session, after he was again given *Miranda* warnings, petitioner admitted that he had hit Hardy, bound and gagged her, and restrained her while others injected her with drugs. Petitioner was arrested on January 11, 1985, and charged with Hardy's murder.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition is Time Barred.

The final judgment of the Supreme Court of Ohio from which petitioner seeks review by writ of certiorari was rendered on March 18, 1987. The petition was not docketed until July 2, 1987. The Court should not relax the provisions of Rule 20.1 in this case. The petition should be considered time barred.

2. The First Question Presented was not Adequately Raised and Preserved in the Lower Courts.

Petitioner did not adequately raise and preserve in the state courts the issue of the voluntariness of his statement to law enforcement officers. Petitioner's motion to suppress and memorandum in support thereof did not assert that his statements were involuntary. In the Court of Appeals and again in the Supreme Court of Ohio, petitioner did not argue that his statements were involuntarily made as a result of promises or for any other reason. Petitioner restricted his argument to the claim that he had a Sixth Amendment right to counsel regarding the slaying of Deborah Hardy and for that reason, his statements should have been suppressed.[3] "[O]rdinarily, this Court does not decide questions not raised or involved in the low-

[3] In the Court of Appeals, petitioner advanced only the Sixth Amendment claim that he was entitled to counsel on the uncharged homicide offense. See assignment of error two set forth in the opinion of the Court of Appeals, appendix to the petition, page A-4. Likewise, petitioner made only the Sixth Amendment claim in seeking review by the Supreme Court of Ohio.

er court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). See *United States v. Mendenhall*, 446 U.S. 544, 551-552, n. 5, (1980). Petitioner's first question presented was not raised, preserved or passed upon by the state courts.

3. Petitioner's Statements were Not Involuntary.

The facts of record do not support petitioner's claim that his statements were involuntary. Petitioner was not promised that he would not be charged with the murder of Deborah Hardy only if he was not the "triggerman", as he now asserts. Rather, petitioner, who had been apprised of his *Miranda* rights on several occasions, was told that he would not be charged with the Hardy murder if he was not the slayer or a participant or a conspirator in the slaying, but was merely a bystander.[4] This statement is not a promise of immunity but merely states the obvious: if petitioner was not involved in the murder, he

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[4] Petitioner states that there is "great debate" as to what investigators said to him. If the record were so unclear on the subject, this case would not be an appropriate one on which to grant the writ of certiorari. However, the state trial judge found that investigators told petitioner that "if he was not the triggerman and had not been a part of the conspiracy or not a participant in her killing or murder, he would not be charged." Trial court decision of October 1, 1985, appendix to petition, page A-11. In his tape recorded statement, petitioner acknowledged this to be the case. Decision of the trial court, appendix to petition, page A-12. These findings of historical fact by a state court, supported by the record, should be deferred to in the absence of convincing evidence to the contrary. See *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Sumner v. Mata*, 449 U.S. 539 (1981).

was not criminally culpable. The converse is equally discernible: if petitioner was involved, he would be charged. This case is not governed by that line of decisions which holds that confessions which are extracted by promises are not voluntary. See *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963). Petitioner was promised nothing. His statements were not involuntary.

4. Petitioner Had No Sixth Amendment Right to Counsel with Respect to the Murder of Deborah Hardy.

Petitioner's statements regarding his involvement in the murder of Deborah Hardy were made before any formal adversarial judicial proceedings were commenced in regard to that crime. Petitioner was not under arrest for the murder of Deborah Hardy, and no charges were preferred against him for that offense until after he acknowledged his participation in the murder. At the time of his statements, petitioner had no Sixth Amendment right to counsel with respect to the murder of Deborah Hardy.

> "By its very terms (the right to counsel) becomes applicable only when the government's role shifts from investigation to accusation.
> * * * *"[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges."
> *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 1146 (1986).

It is without dispute that where there is no right to counsel and an accused is not in custody, there is no basis to suppress his voluntary statements. "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment has not yet attached, are, of course, admissible

at trial of those offenses." *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, at 490 n. 16 (1985).[5] The fact that an attorney-client relationship exists does not create a Sixth Amendment right to counsel. The Sixth Amendment does not protect an attorney-client relationship before prosecution has been commenced by way of formal charge. *Moran, supra*, 475 U.S. 412, 106 S. Ct. 1135 at 1145-1146.[6]

Petitioner, who was not under arrest and not charged with the murder of Deborah Hardy, had no Sixth Amendment right to counsel with regard to that offense. His statements were properly admitted into evidence against him. *Maine v. Moulton, supra.*[7]

[5] Petitioner asserts that footnote 16 in *Moulton* is but *dicta;* that the court should address the issue of informant crimes related to other crimes to which the right to counsel has attached. *Moulton* involved a series of thefts of automobiles and automotive parts. Moulton was under indictment for some of those crimes while others were the subject of his incriminating statements to his co-defendant, an informant for the authorities. Moulton's series of crimes were at least as intertwined as petitioner's sale of cocaine and the murder of Deborah Hardy.

[6] In *Moran*, the accused was in custody in connection with a burglary charge. While being questioned, he implicated himself in a homicide. Counsel was retained to represent Burbine on the burglary charge. Despite the fact, this Court found Burbine had no right to counsel on the uncharged homicide.

[7] Contrary to petitioner's belief, *Michigan v. Jackson*, 475 U.S. , 106 S. Ct. 1404 (1986) is not in conflict with *Maine v. Moulton, supra*, or *Moran v. Burbine, supra.* Jackson involved questioning of an accused about the offense for which he had been arraigned and after he had requested counsel. *Jackson* is not in conflict with *Moran* or *Moulton.*

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of Practice of this Court, I, Alan C. Travis, a member of the Bar of this Court, hereby certify that on the day of July, 1987, three copies of Respondent's Brief in Opposition to the Petition for Writ of Certiorari in the above entitled case were served upon the petitioner by United States Mail, first class, postage prepaid, addressed to Richard A. Cline, Durkin, Cline and Co., L.P.A., 580 South High Street, Suite 316, Columbus, Ohio 43215, counsel of record for petitioner. I further certify that all parties required to be served have been served.

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